No. 9467

United States
Circuit Court of Appeals
For the Ninth Circuit.

W. W. PERCIVAL, Guardian of the persons and estates of John Percival Luce and Dorothy Hume Luce, minors,

Appellant,

vs.

HAROLD LUCE,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Nevada.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Messrs. J. D. SKEEN & E. J. SKEEN,
415 Utah Oil Building,
Salt Lake City, Utah,
For the Plaintiff and Appellant.

HAROLD O. TABER, Esq.,
202 Gazette Building,
Reno, Nevada,
For the Defendant and Appellee. [1*]

In the District Court of the United States
for the District of Nevada.

No. 34

W. W. PERCIVAL, Guardian of the Persons and Estates of John Percival Luce and Dorothy Hume Luce, Minors,

Plaintiff,

vs.

HAROLD LUCE,

Defendant.

COMPLAINT

Plaintiff complains of the defendant and for cause thereof alleges:

1.

That the plaintiff is the duly appointed, qualified and acting general guardian of the persons and es-

*Page numbering appearing at foot of page of original certified Transcript of Record.

tates of John Percival Luce and Dorothy Hume Luce, minors; that the plaintiff and the said minors are both actual and bona fide residents and citizens of the State of Utah; that the defendant is a resident and citizen of the State of Nevada; and that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

2.

That the defendant is the father of the minor children above named and one Dorothy Luce Lehman, formerly Dorothy Luce, is the mother of the said minors; that on the 25th day of February, 1925, the defendant and the said Dorothy Luce Lehman, then Dorothy Luce, entered into an agreement by the terms of which the defendant undertook and agreed to pay to Dorothy Luce Lehman, then Dorothy Luce, the sum of $25.00 per month for the support and maintenance of each of the children above named, such payments to continue until each child attained the age of majority; that a copy of said agreement is attached hereto, marked Exhibit "A", and by this reference made a part of this complaint. [2]

3.

That although often requested the defendant has failed and refused to pay to the plaintiff or to any other person, for the use and benefit of the said minor children, all or any part of said monthly payments due under the terms of said agreement, since on or about the 1st day of November, 1926, and

there is now due and owing, under the terms of the said agreement, the sum of $7,600.00, together with interest on each installment payment, as provided in said contract, from the due date.

Wherefore, plaintiff prays judgment against the defendant for the sum of $7,600.00, together with the legal interest thereon and for costs of this proceeding, and for such other and further relief as the court deems proper.

J. D. SKEEN,
E. J. SKEEN
Attorneys for Plaintiff

State of Utah
County of Salt Lake—ss.

W. W. Percival, first being duly sworn on oath, deposes and says; that he is the plaintiff, above named; that he has read the foregoing complaint, knows the contents thereof, and that it is true to the best of his knowledge, information and belief.

W. W. PERCIVAL
Plaintiff

Subscribed and sworn to before me this 23rd day of June, 1939.

[Seal] E. J. SKEEN
Notary Public [3]

EXHIBIT A

AGREEMENT

This Agreement made and entered into this 25th day of February A. D. 1925, by and between Harold Luce of Reno, Washoe County, Nevada, party of the first part, and Dorothy Luce, of the same place, party of the second part.

Witnesseth:

Whereas, the parties hereto were married on the 16th day of May 1921, and ever since that time have been, and at the present time are, husband and wife; and

Whereas, certain unhappy differences have arisen between the parties hereto as the result of which the party of the second part has commenced, or is about to commence an action for divorce against the party of the first part; and

Whereas, there are now living as the issue of said marriage, two children, to-wit: John Percival Luce, now of the age of about three, and Dorothy Hume Luce, now of the age of about one and one-half years; and

Whereas, the parties hereto are desirous of agreeing upon the matter of the custody of the children and of the amount the party of the first part should pay to the party of the second part for the support of herself and the two minor children in the event a decree of divorce should be granted:

Now Therefore, in consideration of the premises as hereinafter mentioned, the parties hereto agree as follows:

First: That the party of the second part may be awarded the custody of the aforesaid children with the right and privilege in the party of the first part to visit with said children, at any and all reasonable time, after reasonable notice to the party of the second part;

Second: For the support and maintenance of the aforesaid children the party of the first part shall pay to the party of the second part the sum of $25.00 per month for each of said [4] children, the payment of said sum of $25.00 per month to discontinue as each child attains the age of majority.

Third: For her support and maintenance, the party of the first part shall pay to the said party of the second part the sum of $30.00 per month for a period of not to exceed two years from date; said payments to cease in the event the party of the second part remarries within the two years.

Fourth: The party of the first part shall forthwith cause to be changed the beneficiary named in a certain $3,000.00 insurance policy he now holds in the New York Life Company, wherein the party of the second part is now named as beneficiary so that the afore-mentioned children shall receive the benefit of said insurance.

Fifth: In consideration of the foregoing, the party of the second part hereby relinquishes all right, claim or demand that she might have in and to any property of the party of the first part whether the same be separate property or what might at present be considered community prop-

erty; and she further releases the said party of the first part from the payment of any sum, or sums, for any purpose whatsoever other than that hereinbefore specified, provided, however, that in the event the court, upon proper application being made therefor, should at any time in the future decide that the said $25.00 per month for the support of each of said children, is insufficient, then the said party of the first part agrees to increase that amount as ordered by the court.

Each of the parties hereto acknowledges that he, or she, has entered into this agreement and has signed and executed the same with full knowledge of all of the existing facts concerning the property of both of the parties hereto, as well as the present income and earning capacity of the party of the first part hereto, and that each of the said parties has sought the advice of independent counsel and signs this agreement freely and voluntarily. [5]

In Witness Whereof, the parties hereto have signed their names on the day and year in this agreement first above written.

(Signed) HAROLD LUCE
Party of the First Part
(Signed) DOROTHY LUCE
Party of the Second Part

[Endorsed]: Filed June 27, 1939. [6]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant answering the Complaint on file herein and Admits, Denies and Alleges:

First Defense

The Complaint *failes* to state a claim against the defendant upon which relief can be granted.

Second Defense

Defendant denies that the name of said minor children mentioned in paragraph I is Luce. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the Complaint. Defendant admits that he is the natural father of John Percival Lehman and Dorothy Lehman; alleges that one Irving Lehman is the father of said minor children by adoption as is more particularly hereinafter set forth in defendant's Sixth Defense; defendant admits the allegations contained in paragraphs II and III of the Complaint, save and except, that defendant denies that he was requested to make payments of money for the support of said minor children; defendant denies that there is now due and owing under the terms of said agreement, or any other obligation, the sum of Seven Thousand Six Hundred Dollars ($7600.00), or any part thereof.

Third Defense

The agreement, upon which plaintiff's Complaint is based, does [7] not exist. Said agreement was made in contemplation of a divorce and was merged into and became a part of a judgment and decree of divorce duly made and entered on the 25th day of February, 1925, by the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, in that certain cause entitled Dorothy P. Luce vs. Harold H. Luce, the same being case #21455 in the records and files of said court. The parties to said divorce action are the parties to the agreement, a copy of which is attached to plaintiff's Complaint as Exhibit "A".

Fourth Defense

The agreement upon which plaintiff's Complaint is based, was rescinded by the parties in November, 1926. From the date of the divorce mentioned in defendant's Third Defense to and including November 1, 1926, defendant made payments of Fifty Dollars ($50.00) per month to his former wife for the use and benefit of said minor children. On or about November 13, 1926, defendant's certified check in the sum of Fifty Dollars ($50.00) remitted to Dorothy Lehman, formerly Dorothy Luce, was returned by her to the defendant. At the time said check was returned to defendant by Dorothy Lehman, the said Dorothy Lehman advised the defendant that said minor children had been adopted, and that further payments for the support of the said

minor children would not be accepted by her or by any one else on behalf of the said minor children. Relying on the refusal to accept further payments for the support of said minor children, defendant since said date has made no payments for their support. Since November, 1926, no demand has been made upon defendant for contributions for the support of said minor children by the plaintiff, or by any one else on behalf of said minor children.

Fifth Defense

The Complaint affirmatively shows that the plaintiff, W. W. Percival, is in the same position as Dorothy Lehman, formerly Dorothy Luce, the mother of said minor children, and that said [8] Dorothy Lehman, and also the plaintiff standing in her shoes, for an unconscionably long period of time, have abandoned and slept on any right or rights they or either of them may have had for and on behalf of said minor children, by virtue of said agreement, and, therefore, have been guilty of laches.

Sixth Defense

On October 14, 1926, the Second Judicial District Court of the State of Utah, in and for the County of Weber, duly made and entered a judgment and decree of adoption in that certain cause entitled "In the Matter of the Adoption of John Percival Luce and Joan Luce, sometimes called Dorothy Luce, Minors", the same being case #4272 in the records and files of said court, wherein it was ordered that

John Percival Luce and Joan Luce, sometimes called Dorothy Luce, be adopted by Irving Lehman and his wife Dorothy Lehman, formerly Dorothy Luce. By said judgment and decree of adoption the names of said minor children were changed to John Percival Lehman and Joan Lehman, and said minor children were decreed the right of support, protection and inheritance from their adopting parents. Since October 14, 1926 to the present time, said minor children have been treated and regarded as the lawful children of Irving Lehman and Dorothy Percival Lehman, and have sustained towards said adopting parents the status of children and parents. Said judgment and decree of adoption is still in full force and effect.

Wherefore, defendant prays that plaintiff take nothing by reason of his Complaint and that the same be dismissed, and for defendant's costs incurred herein.

HAROLD O. TABER
Attorney for defendant
202 Gazette Building
Reno, Nevada

[Endorsed]: Filed July 22nd, 1939. [9]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now the plaintiff and moves for a judgment on the pleadings in accordance with the prayer of the complaint heretofore filed in the above entitled case.

J. D. SKEEN,
E. J. SKEEN
Attorneys for the Plaintiff

State of Utah
County of Salt Lake—ss.

Louise Russell, being first duly sworn on oath, deposes and says; that she is a stenographer employed in the office of J. D. and E. J. Skeen, attorneys for the plaintiff; that on the 19th day of August, 1939, she deposited a copy of the foregoing Motion in an envelope addressed to Harold O. Taber, Attorney at Law, Reno, Nevada; that on said date she affixed the proper postage to said envelope and deposited it in the United States Post Office for mailing.

LOUISE RUSSELL

Subscribed and sworn to before me this 19th day of August, 1939.

[Seal] E. J. SKEEN
Notary Public

[Endorsed]: Filed Aug. 21, 1939. [12]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON THE PLEADINGS

The defendant moves the Court as follows:

For judgment on the pleadings that plaintiff take nothing by reason of his complaint and that the same be dismissed, and for defendant's costs of suit incurred herein.

HAROLD O. TABER
Attorney for Defendant
202 Gazette Building
Reno, Nevada

[Endorsed]: Filed Aug. 23, 1939. [13]

In the District Court of the United States of America, in and for the District of Nevada.

No. 34.

W. W. PERCIVAL, Guardian of the Persons and Estates of John Percival Luce and Dorothy Hume Luce, Minors,

Plaintiffs,

vs.

HAROLD LUCE,

Defendant.

DECISION RE MOTIONS FOR JUDGMENT ON THE PLEADINGS

Plaintiff's motion for judgment on the pleadings in accordance with the prayer of the complaint, and

Defendant's motion for judgment on the pleadings that Plaintiff take nothing by reason of his complaint and that the same be dismissed and for defendant's costs of suit incurred herein, having been submitted to the Court upon briefs filed by the respective parties and the Court being fully advised in the premises, it is

Ordered: that Plaintiff's said motion be, and the same hereby is, denied. That Defendant's said motion be, and the same hereby is granted. That judgment be entered accordingly.

Dated this 14th day of November, 1939.

FRANK H. NORCROSS
District Judge

[Endorsed]: Filed Nov. 14, 1939. [14]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendant and to Harold O. Taber, His Attorney:

You, and each of you, will please take notice that the plaintiff hereby appeals to the Circuit Court of Appeals, Ninth Circuit, from that certain judgment made and entered herein on the 14th day of November, 1939 denying plaintiff's motion for judg-

ment on the pleadings and granting the defendant's motion for judgment on the pleadings.

J. D. SKEEN
E. J. SKEEN
Attorneys for Plaintiff

[Endorsed]: Filed Feb. 10, 1940. [15]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK,
U. S. DISTRICT COURT.

United States of America,
District of Nevada—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of W. W. Percival, Guardian of the Persons and Estates of John Percival Luce and Dorothy Hume Luce, Minors, Plaintiff, vs. Harold Luce, Defendant, said case being No. 34 on the civil docket of said court.

I further certify that this transcript, consisting of 21 typewritten pages and numbered from 1 to 21, inclusive, contains a full, true and correct transcript of the proceedings in said matter and of all papers filed therein, as set forth in the Designation of Contents of Record on Appeal filed in said case and

made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid. [20]

And I further certify that the cost of preparing and certifying to said record, amounting to $4.20, has been paid to me by E. J. Skeen, Esq., attorney for the appellant herein.

Witness my hand and the seal of said United States District Court this 7th day of March, 1940.

[Seal] O. E. BENHAM

Clerk, U. S. District Court.

[21]

[Endorsed]: No. 9467. United States Circuit Court of Appeals for the Ninth Circuit. W. W. Percival, Guardian of the persons and estates of John Percival Luce and Dorothy Hume Luce, minors, Appellant, vs. Harold Luce, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed, March 8, 1940.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

#9467

[Title of District Court and Cause.]

CONCISE STATEMENT OF THE POINTS UPON WHICH APPELLANT INTENDS TO RELY.

Comes now the plaintiff and appellant and makes the following concise statement of the points upon which he intends to rely on the appeal herein.

1.

The court erred in denying the plaintiff's motion for judgment on the pleadings.

2.

The court erred in granting the defendant's motion for judgment on the pleadings.

J. D. SKEEN
E. J. SKEEN
Attorneys for Plaintiff and Appellant.

State of Utah
County of Salt Lake—ss.

Louise Russell, being first duly sworn on oath, deposes and says; that she is a stenographer employed in the office of J. D. Skeen and E. J. Skeen, attorneys for the plaintiff that on the 5th day of March 1940, she deposited a copy of the foregoing Concise Statement in an envelope addressed to Harold O. Taber, Reno, Nevada; that on said date

she affixed the proper postage to said envelope and deposited it in the United States Post Office for mailing.

LOUISE RUSSELL

Subscribed and sworn to before me this 5th day of March, 1940.

[Seal] E. J. SKEEN
Notary Public.

[Endorsed]: Filed Mar. 8, 1940. Paul P. O'Brien, Clerk.

#9467

[Title of District Court and Cause.]

DESIGNATION OF PARTS OF THE RECORD TO BE PLEADED

Comes now the Appellant and designates the following parts of the record for printing:

1. Complaint (as amended by interlineation)
2. Plaintiff's motion for judgment on the pleadings.
3. Defendant's motion for judgment on the pleadings.
4. Decision—Re Motion for judgment on the pleadings.
5. Order granting defendant's motion and denying plaintiff's motion.

J. D. SKEEN,
E. J. SKEEN,
Attorneys for Plaintiff and Appellant.

State of Utah
County of Salt Lake—ss.

Louise Russell, being first duly sworn on oath, deposes and says; that she is a stenographer employed in the office of J. D. Skeen and E. J. Skeen, attorneys for the plaintiff that on the 5th day of March 1940, she deposited a copy of the foregoing Designation in an envelope addressed to Harold O. Taber, 201 Gazette Bldg., Reno, Nevada, that on said date she affixed the proper postage to said envelope and deposited it in the United States Post Office for mailing.

LOUISE RUSSELL

Subscribed and sworn to before me this 5th day of March 1940.

[Seal] E. J. SKEEN
Notary Public

[Endorsed]: Filed Mar. 8, 1940. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9467

W. W. PERCIVAL, Guardian of the Persons and Estates of John Percival Luce and Dorothy Hume Luce, Minors,

Appellant,

vs.

HAROLD LUCE,

Appellee.

DESIGNATION OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED

Pursuant to subdivision 6 of Rule 19 of the rules of the above-entitled Court, appellee designates the following additional parts of the record to be printed.

1. The Answer of the defendant and appellee.

HAROLD O. TABER
Attorney for Appellee
201 Gazette Building
Reno, Nevada.

[Endorsed]: Filed Mar. 13, 1940. Paul P. O'Brien, Clerk.